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IN THE

Supreme Court of the United States

October Term, 1968

No. 1327

SOUTHERN PACIFIC COMPANY, a Corporation,

Petitioner,

vs.

MIKE SABELLA,

Respondent.

On a Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF RESPONDENT IN OPPOSITION

JAMES F. BOCCARDO
EDWARD J. NILAND
111 West St. John Street
San Jose, California 95113
Attorneys for Respondent.

SPARTAN PRINTING CO., INC., SAN JOSE, CALIFORNIA

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OPINIONS BELOW.

The opinion of the Supreme Court of the State of California is reported in 70 A.C. 323, 74 Cal. Rptr. 534, 449 P. 2d 750.

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, is

reported in 262 A.C.A. 582, 68 Cal. Rptr. 896. (Under California law, by the order of transfer to the Supreme Court of the State of California, the opinion and decision of the California Court of Appeal has become a nullity and without any force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed. *Ponce v. Marr*, 47 Cal. 2d 159, 301 P. 2d 837; *Knouse v. Nimocks*, 8 Cal. 2d 482, 66 P. 2d 438).

JURISDICTION.

The judgment of the Supreme Court of California which is sought to be reviewed is based upon an adequate and independent state ground. No question or claim within the purview of 28 U.S.C., Section 1257(3), has been properly raised by petitioner. The decision of the California Supreme Court is based solely upon the application of a sound and well settled state rule of procedure, which has been uniformly and consistently applied in all civil actions tried in the courts of California. No federal question of any substance has been presented by petitioner.

QUESTIONS PRESENTED.

1. Whether any federal question requiring review by this Court arises out of the affirmance by the highest court of a state of a judgment in favor of the plaintiff in an action tried before a jury in a lower state court

under the Federal Employers' Liability Act, where the highest state court, in affirming such judgment, as reduced by a remittitur in the lower court, has based its decision upon the following conclusions: (a) the trial judge acted properly in ordering a remittitur on grounds which related solely to the issue of damages; (b) since there has been no contention that the damages, as reduced by the remittitur, are excessive, both the application and the result of the remittitur were proper; (c) by necessary implication, the trial judge, in ruling upon the defendant's motion for a new trial, rejected the contention that plaintiff's counsel had been guilty of prejudicial misconduct; and (d) assuming for the purposes of discussion that plaintiff's counsel had made statements which were improper and prejudicial and which went to the issue of liability, defendant's claim of misconduct was nevertheless not entitled to consideration, since defendant had failed to take the proper procedural steps at the trial to preserve the issue of prejudice on appeal.

2. Whether in an action tried in a state court under the Federal Employers' Liability Act, the defendant has an absolute right, on an appeal from a judgment in favor of the plaintiff, to raise a claim of prejudicial misconduct on the part of the plaintiff's counsel, notwithstanding the fact that such defendant had ignored and had failed to comply with a firmly established state rule of procedure requiring all litigants in all civil actions to make proper and timely objections and to request admonitions to the jury, whenever an

admonition would be effective, in order to preserve the right to assert on appeal a claim of prejudicial misconduct on the part of counsel for the prevailing party.

STATEMENT OF THE CASE.

In 1961 the plaintiff, a fifty-six year old carman cutter employed by the defendant, was injured when a section of a car roof, which the plaintiff had previously cut with an acetylene torch and upon which he was then walking, was prematurely and negligently lifted up into the air by the defendant's crane operator. The latter denied that he had moved the section of the roof at all, but he was impeached on this point by his own testimony. The defendant's theory of contributory negligence was that, in cutting the section of the roof, the plaintiff had failed to leave a sufficient overlap and that the accident was caused by the claimed inadequacy of the overlap. The defendant had no rules or regulations concerning the size of the overlap, and no instructions on this subject were given to the plaintiff during his thirty-six years as a cutter. No witness testified that the manner in which the plaintiff had cut the roof section could have caused, or that it did in fact cause, the roof section to fall. Since the accident the plaintiff has never worked again, and he testified that the defendant never offered him a job.

On February 1, 1965, the jury returned an unanimous verdict in favor of the plaintiff in the amount of $115,500.00. The defendant moved for a new trial on a number of grounds, including (a) excessive dam-

ages; (b) error of law in refusing to receive evidence that the plaintiff had applied for a disability pension under the Railroad Retirement Act; and (c) misconduct on the part of plaintiff's counsel. The trial Court made a conditional new trial order. It found that the evidence was insufficient to sustain the verdict and that there had been an error of law prejudicial to the defendant. It did *not* find that there had been any prejudicial misconduct on the part of the plaintiff's counsel. On the basis of its findings, the trial Court attempted to bring the litigation to an expeditious and reasonable termination by exercising its power of remittitur. On March 29, 1965, it ordered that unless the plaintiff would consent to remit $35,500.00, a new trial would be granted. The plaintiff, who was then almost sixty years of age, consented. Thereafter, the defendant appealed from the judgment, as reduced to the amount of $80,000.00.

On appeal it was agreed by the parties that both of the grounds upon which the trial Court's conditional new trial order was based related solely to the amount of the damages and not to the issue of liability. It was also agreed that the single "error in law" referred to by the trial Court related to the claimed error in excluding the evidence relating to the disability pension.

On May 28, 1968, the Court of Appeal of the State of California, First Appellate District, Division Four, reversed the judgment on the sole ground of misconduct on the part of plaintiff's counsel. The Court of Appeal rejected defendant's contention that the ex-

clusion of the evidence relating to the disability pension was error. It indulged in an assumption, however, that the trial judge might have found prejudicial misconduct on the part of plaintiff's counsel and that he might have attempted to correct the effect of such misconduct by reducing the amount of the judgment. On the basis of this unwarranted assumption, the Court of Appeal held that even though plaintiff "had a good case" and even though the judgment as reduced was not excessive, it must be reversed. It acknowledged that defendant's counsel never requested any admonitions to the jury, but it held that "conforming with a precise ritual" was not necessary in this case.

The Supreme Court of California granted plaintiff's petition for a hearing, and on February 7, 1969, it affirmed the judgment. It held that whether or not the exclusion of the evidence relating to the disability pension was error, the remittitur was proper, since the trial Court had based its order upon a consideration of all the evidence relating to damages, including the rejected evidence. It also held that the result of the remittitur was proper, since the only defect related to the measure of damages and there was no contention that the damages as reduced were excessive.

The California Supreme Court also rejected defendant's claim of prejudicial misconduct on the part of plaintiff's counsel. It did *not* overrule the trial Court's necessarily implied finding that there had been no such prejudicial misconduct. It did assume, for the purposes of discussion, that there had been prejudicial misconduct which went to the issue of liability, but

it held that defendant had waived the claim of misconduct by its failure to take proper steps to preserve the issue of prejudice on appeal. The California Supreme Court pointed out that the defendant had remained silent as to all but one line of argument and that as to the latter it had objected, but it had failed at any time to request an admonition to the jury. (It was also pointed out that a number of defendant's objections included an improper attempt to inject by indirect reference the excluded evidence relating to the plaintiff's disability pension). The California Supreme Court held that "the long established procedure of admonishing the jury" is not a meaningless ritual, but a rule of procedure which has been designed through judicial experience to prevent by timely words of caution the very problem involved in this case. It was held that an admonition would have been effective, especially if requested at the outset, and in the particular circumstances of this case, the defendant's failure to request an admonition precluded a consideration of its claims of misconduct.

The defendant did not petition the California Supreme Court for a rehearing. On March 26, 1969, the defendant's application for stay of execution and enforcement of the judgment was denied by the California Supreme Court. On April 7, 1969, defendant's application to the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States allotted to the Ninth Judicial Circuit of the United States, for a stay of execution of judgment was also denied.

ARGUMENT.

I.

THE DECISION OF THE CALIFORNIA SUPREME COURT DOES NOT PRESENT ANY FEDERAL QUESTION.

A. Neither the California trial court or the California Supreme Court has found that plaintiff's counsel was guilty of prejudicial misconduct.

The conditional new trial order entered in the California lower court specified the grounds upon which it was based. It did not mention the ground of misconduct of counsel. Consequently, as pointed out in the opinion of the California Supreme Court, the allegation of prejudicial misconduct was, by necessary implication, rejected by the trial court.

Furthermore, the California Supreme Court did not make any finding that plaintiff's counsel was guilty of misconduct which prejudiced the defendant on the issue of liability. It merely assumed for purposes of discussion that this was so, and it held that if there had been such prejudicial misconduct, and if defendant had preserved the issue for appellate consideration, the effect of the assumed prejudice could not be cured by remittitur. It held, however, that defendant had failed to preserve the issue of prejudice on appeal, so that it was unnecessary to reach this issue on the merits.

The California Supreme Court acknowledged that the trial judge is in a better position than an appellate Court to determine whether a verdict resulted wholly, or in part, from the asserted misconduct of counsel and his conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong. The California Supreme Court has not held that the trial judge in this action was plainly wrong in rejecting defendant's contention of prejudicial misconduct of counsel.

This case, then, is unlike *Moquin v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 283 U.S. 520, in which this Court granted a writ of certiorari limited to the question arising from the failure of the state court to grant an unconditional new trial after having made an express finding that the verdict was obtained by appeals to passion and prejudice. No such finding has been made in the present case, either by the trial court or by the California Supreme Court.

B. The decision of the California Supreme Court relating to the question of prejudicial misconduct of counsel is based solely upon the application of a well established state rule of procedure.

Questions relating to the conduct of counsel during the trial of an action under the Federal Employers' Liability Act are procedural matters which are governed by the law of the forum. (*St. Louis-San Fran-*

cisco Railway Company v. King (Okla.) 278 P. 2d 845, 850). The process of determining on appeal whether any error was committed during the trial of such an action and, if so, whether such error was prejudicial is also a matter of practice and procedure. (*King v. Schumacher,* 32 Cal. App. 2d 172, 89 P. 2d 466, cert. den. 308 U.S. 593).

It has long been the rule in California that an appellant who wishes to raise the claim of misconduct on the part of the respondent's counsel must first show, not only that he made a timely and proper objection to the offending remarks, but also that he requested the trial judge to give an appropriate admonition to the jury. In *Scott v. Times-Mirror Co.,* 181 Cal. 345, 368; 184 P. 672, 682, the California Supreme Court held:

> ". . . In no case was the court requested to instruct the jury that the conduct objected to was improper and that it was to be disregarded by them. Where the action of the trial court is not thus invoked the alleged misconduct will not be considered on appeal, if an admonition to the jury would remove the effect thereof. (*People v. Babcock,* 160 Cal. 537, [117 Pac. 549]; *Grossetti v. Swetsey,* 176 Cal. 793, [169 Pac. 687]). From an examination of the record on this point we are of the opinion that even if the plaintiff had been guilty of misconduct, an admonition from the court would have removed the effect thereof in every instance."

In *Horn v. Atchison T. & S. F. Ry. Co.,* 61 Cal. 2d 602, 611; 394 P. 2d 561, 566, cert. den., 380 U.S. 909, the California Supreme Court stated:

> "... we are aware of no California case wherein a plaintiff's verdict was reversed for misconduct during his counsel's argument in the lack of timely objections and a request that the jury be admonished where such an admonishment could be effective."

Petitioner has erroneously asserted that the California Supreme Court has ignored some earlier California decisions. These decisions have been cited in footnote 4 on page 4 of the petition. None of the cited cases support petitioner's assertion. In most of them an admonition was given by the trial judge, even though it had not been requested. On appeal, however, it was held that the misconduct was of such a character that the admonition was not effective. None of these cases stand for the rule that it is unnecessary to request an admonition where it would be effective.

In the case at hand, the California Supreme Court has specifically determined that on those few occasions when defendant's counsel did object to the remarks of plaintiff's counsel, an admonition by the trial judge would have removed any improper effect of such remarks. In holding that the failure to request an admonition at any time constituted a waiver of the claim of error, the California Supreme Court has explicitly rejected petitioner's contention that the misconduct in this case was of such a character that the exception to the rule of waiver came into operation.

New York Central Railroad Company v. Johnson, 279 U.S. 310, also cited by petitioner, is not in point. That case was tried in the federal court, and at the

trial, objections were made to certain statements of plaintiff's counsel. The objections were overruled, and exceptions were noted. Since the trial judge had overruled defendant's objections, it is obvious that it would have been pointless to request an admonition to the jury, and no admonition was requested. It was contended that the objections were not sufficiently specific to justify a reversal, but this Court held that the failure of counsel to particularize an exception would not preclude it from correcting the error.

Johnson involved the erroneous failure of a federal trial judge to sustain objections to improper argument. It did not involve a state rule of procedure which requires both objections and a request for an admonition to the jury, where such a request would be effective. There was no waiver of the right to assert error in *Johnson*, as there was in the present case.

II.

IN AN ACTION TRIED IN A STATE COURT UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, THE APPLICATION OF AN ESTABLISHED STATE RULE OF PROCEDURE REQUIRING ALL LITIGANTS IN ALL CIVIL ACTIONS, AS A PREREQUISITE TO THE PRESERVATION OF THE RIGHT TO RAISE THE CLAIM OF MISCONDUCT OF COUNSEL ON APPEAL, TO MAKE TIMELY AND PROPER OBJECTIONS AND TO REQUEST AN ADMONITION TO THE JURY, WHENEVER SUCH AN ADMONITION WOULD BE EFFECTIVE, DOES NOT DEFEAT, DIMINISH OR DESTROY ANY SUBSTANTIVE RIGHT OR DEFENSE ARISING UNDER THE ACT.

A. In an action tried in a state court under the act, the right to a jury trial is subject to those procedural rules of the forum which do not defeat or diminish any substantive rights or defenses arising under the act.

A state court may apply its own procedural rules concerning the mechanics of a jury trial in an action under the Federal Employers' Liability Act. (*Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211). It is only when a state procedural rule impairs or interferes with a substantive right or defense under the Act that it will be held inapplicable. (*Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359).

Petitioner has cited several decisions involving local rules or practice which, although superficially "procedural" in nature, actually had a substantive impact upon the nature of the rights created by the Act. (E.g., *Davis v. Virginian R. Co.*, 361 U.S. 354 (state court's erroneous determination that employee's evidence was insufficient to require submission to jury); *Arnold v. Panhandle & S. F. R. Co.*, 353 U.S. 360 (state court's erroneous application of state rule that general verdict must yield to inconsistent special verdicts); *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359 (state rule denying any right to jury trial on question of validity of release given by employee); *Brown v. Western Ry. of Alabama*, 342 U.S. 359 (state court's erroneous determination of sufficiency of allegations in employee's complaint); *Brady v. Southern R. Co.*, 320 U.S. 467 (state court's erroneous determination that evidence was insufficient to support verdict for employee); *Central Vermont R. Co. v. White*, 238 U.S. 507 (state court's erroneous application of state rule imposing upon plaintiff the burden of disproving contributory negligence).

None of these decisions support the contention that a state rule requiring timely and proper objections and a request for an admonition, where an admonition would be effective, is inapplicable in an action tried in the state court under the Act. Such a rule does not in any way impair or diminish the substantive rights of the parties. It is a rule which is universally recognized in one form or another. It does not interfere with or attempt to modify any of the incidents of the

Act. The parties are left entirely free to assert all of their rights and defenses. It merely requires them to make a timely and proper protest whenever they deem themselves aggrieved by any statements of opposing counsel and to make a timely and proper request that the trial judge give an appropriate admonition to the jury. This is a reasonable and salutary requirement, and compliance with such a rule imposes no undue burden whatsoever on any litigant.

The California Supreme Court has held that this procedural rule is remedial in nature and that it is designed to obviate the necessity for expensive and burdensome retrials. (See, *Horn v. Atchison, T. & S. F. Ry. Co.*, 61 Cal. 2d 602, 394 P. 2d 561, cert. den. 380 U.S. 909). It is not a rigid and inflexible rule, but it is subject to a reasonable exception whenever it appears that the asserted misconduct was of such unusual character that its effect could not have been cured by any action of the trial judge. The application of such a procedural rule clearly does not diminish or defeat any substantive right or defense under the Act.

B. The California Supreme Court's determination that the defendant did not preserve the right to raise the claim of misconduct on appeal does not give rise to any federal question.

The record in this case fully supports the California Supreme Court's determination that, by its failure

to comply with a well established procedural rule, the defendant has waived its right to complain about misconduct of counsel on its appeal. Defendant made no objection of any kind to most of the asserted misconduct. On pages 12-15 of defendant's petition, it has thrown together more than thirty instances of "misconduct," all lifted out of context. However, it objected to only about ten percent of these remarks, remaining totally quiescent on all of the other occasions. When it did object, it is glaringly apparent that the primary, and improper, purpose of defendant's counsel was to let the jury know that he had certain evidence which the trial judge would not receive. At no time did defendant request any protective or clarifying instruction. It is obvious that defendant was content to take its chances with the jury, saving its present complaints for the post-trial proceedings.

There is no reason whatsoever to believe that the trial judge was in any way influenced by the remarks of plaintiff's counsel, and yet the trial judge has given his judicial approval to the jury's verdict insofar as the issue of liability is concerned. In requiring the employee to accept a reduction in the amount of the verdict, the trial court may have erred to the disadvantage of the employee, but he has consented to such reduction and he cannot now retract his consent.

The issue of liability was fully presented and fairly decided in this case. Neither the lower state court or the highest state court has found that the defendant was in fact prejudiced by any of the remarks of plain-

tiff's counsel. No contention has been made that the judgment, as reduced, is excessive. The California Supreme Court's determination that the defendant waived any right to an appellate consideration of its claim of misconduct of counsel, by failing to request admonitions which would have been effective in the circumstances of this case, does not diminish or destroy any substantive rights or defenses under the Federal Employers' Liability Act. The defendant, which was represented by experienced counsel, has only itself to blame for its failure to comply with a well established procedural rule. Neither the "integrity of the jury" or the "uniform administration of the federal statute" are affected by a state procedural rule which affords to all parties full opportunity to invoke the corrective action of the trial judge, if the parties should see fit to take advantage of that opportunity. The question raised by defendant in its petition relate entirely to matters of procedure which are governed by the rules of the forum. No federal question warranting review by this court has been presented.

CONCLUSION.

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAMES F. BOCCARDO
EDWARD J. NILAND
Attorneys for Respondent.

PROOF OF SERVICE.

I certify that I am a member of the bar of the Supreme Court of the United States and counsel for Mike Sabella, the respondent in the foregoing Brief in Opposition and the party in behalf of whom the service herein stated has been effected; that the person upon whom service was made was the counsel of record for the petitioner, Southern Pacific Company, in the California courts in the action dealt with in the foregoing Brief in Opposition and resides within 500 miles of San Jose, California, where I reside and have my office; that on the 27th day of May, 1969, I served three copies of the foregoing Brief in Opposition upon said counsel for petitioner by enclosing them in a sealed envelope and depositing that envelope in a United States mail box in San Jose, California, with first class postage thereon prepaid and addressed to said counsel at his post office address as follows:

Arthur B. Dunne
333 Montgomery Street
San Francisco, California 94104.

JAMES F. BOCCARDO,
Attorney for Respondent.